81-1331

No.

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1981

DENNIS WISE,
Petitioner,

vs.

STATE OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Does the use by the prosecution of evidence of a conspiracy and agreement to murder for hire to prove elements of the crime of murder in the first degree after the Appellant had been acquitted of the conspiracy violate the double jeopardy clause of the Constitution of the United States through the doctrine of collateral estoppel.

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Petitioner moves this Court to issue a Writ of Certiorari to review the Denial of a Petition for Writ of Certiorari by the Court of Appeals of Maryland and to review the Judgment and Opinion entered on February 6, 1981 by the Court of Special Appeals of Maryland.

DECISION BELOW

The Denial of the Petition for Writ of Certiorari by the Court of Appeals of Maryland is reported as No. 38, September Term, 1981,

Wise v. State of Maryland (filed March 23, 1981, denied May 27, 1981), and the Judgment and Opinion of the Court of Special Appeals of Maryland is reported as No. 674, September Term, 1981, Wise v. State of Maryland (filed February 6, 1981). A copy of that Judgment and Opinion is attached hereto.

JURISDICTION

Jurisdiction is invoked under Article 28 U.S.C. §1257(3), and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an Appeal from the Denial of the Writ of Certiorari and the affirmance of the conviction of the Petitioner by the Court of Special Appeals of Maryland after he had been found guilty of the crime of murder in the first degree by the Criminal Court of Baltimore City.

STATEMENT OF FACTS

Dennis Wise was originally indicted in three (3) indictments charging: (1) the conspiracy to murder James Reid, (2) the conspiracy to murder B. A. Addison and (3) the murder of James Reid. On September 25, 1979, trial began before the Honorable Martin B. Greenfeld and a jury which lasted several days and resulted in verdicts of not guilty as to the charge of conspiracy to murder James Reid and conspiracy to murder B. A. Addison. The testimony adduced at that trial was included in the hearing before Judge Dorf and offered by the Defendant as an exhibit. The purpose in offering that testimony was for the court to make its determination as to what issues had been decided by the jury in rendering its verdicts of not guilty on September 27, 1979.

The evidence produced by the State at the September trial rested in large measure on the testimony of two witnesses: Derochea

Leak and Harry Lockwood. Through these witnesses, the prosecution sought to prove that Derochea Leak had been the girlfriend of the co-defendant, Gilbert Wiley. Wiley, the testimony revealed, was alleged to have been a major narcotics trafficker who stored his drugs and profits at the apartment of Derochea Leak. Jamie Reid, one of the deceased, was a lower level street dealer of narcotics who had in the past worked for Gilbert Wiley.

The State alleged through its evidence that sometime in January, 1979, Derochea Leak had left her apartment approximately 4:00 A.M. to take some trash to the dumpster. Upon returning to her apartment she was accosted by three (3) men who raped her and stole from the apartment drugs and money purportedly belonging to Gilbert Wiley. Miss Leak reported these events to Gilbert Wiley and indicated to him that she was able to identify one person. Armed with this information, Gilbert

Wiley contacted Harry Lockwood who resided in New York to seek his assistance in identifying and finding the persons responsible.

Harry Lockwood was an acquaintance of Gilbert Wiley who had in the past provided heroin and cutting agents to Gilbert Wiley and Derochea Leak. Mr. Wiley arranged for Derochea Leak to talk directly with Harry Lockwood; and after they discussed the incident, Mr. Lockwood suggested that he knew the identity of the assailants. Sometime later Harry Lockwood called Gilbert Wiley in Baltimore and advised him that one of the persons that he was able to identify was B. A. Addison and that he had just seen him in New York. To this Wiley responded that he would send his man up to New York to meet Lockwood.

The next day according to Lockwood's testimony, the defendant Dennis Wise arrived in New York and said to Lockwood, "Gil sent me." Lockwood then left the home to find

B. A. Addison. Several hours later he returned and pointed out Addison to Dennis Wise. Thereafter it was alleged that Dennis Wise shot B. A. Addison and returned to the Lockwood residence. Lockwood by his testimony was upset and called Gilbert Wiley in Baltimore and said, "What the hell is going on here." Lockwood also suggested that Wise told him that he gets paid $2,000.00 for these contracts.

The Assistant State's Attorney in his opening and closing remarks to the jury made it perfectly clear that the State's theory was that Gilbert Wiley had hired Dennis Wise as a "contract killer" to execute James Reid and B. A. Addison. In his opening comments, the prosecution stated:

> "Ladies and gentlemen of the jury, I tell you that the evidence will show that these two killings and these conspiracies all arose from the involvement of narcotics, the involvement of power and money that the illegal traffic of narcotics brought to Mr. Wiley." (T.18)

In his closing remarks the prosecutor suggested:

> "Remember you are not killing out of hatred, you are not killing at the spur of the moment when emotion has you, you are killing for profit. You are killing as a job. A job, as the twelve of you go to work and come home at five o'clock or whenever you come home, you earn your pay check. That is what this man does, Mr. Wise. As the rest of you go through your lives and make contracts to buy homes and other things and televisions, sign contracts to make obligations, so does Mr. Wise. He enters into agreements not to do the things that are productive or normal. Mr. Wise enters into agreements to kill human beings. That's Mr. Wise's job. His job." (T.326)

Of course, the defendant Dennis Wise and the co-defendant Gilbert Wiley were found not guilty of each conspiracy charge.

After the verdicts of not guilty were entered, the murder case was called for trial before the Honorable Paul A. Dorf; but prior to trial, the court was called upon to rule as to whether alleged prior acts of the defendant Wise would be admitted at this trial.

The State argued that the prior acts constituted a common scheme and therefore were admissible under an exception to the general rule that uncharged conduct was not admissible at the trial of the accused. The defendant maintained that the requisites of the common scheme exception were not met and further that under the doctrine of double jeopardy and collateral estoppel the State was precluded from offering this evidence. Judge Dorf ruled that the hearsay evidence normally admissible in a conspiracy trial as an exception to the hearsay rule would not be permitted but that the other evidence of the conspiracy would be permitted. To this the defendant objected. He made continual objections throughout the trial, and ultimately, the trial court granted him a continual objection to all evidence of this nature.

In his opening statement the Assistant State's Attorney (who was the same prosecutor

as from the trial in September before Judge Greenfeld) told the jury that this "was not any usual type of killing but was a contract killing." (T.24) He then went on to lay out for the jury the background that was to be provided by Derochea Leak as augmented by Harry Lockwood showing again the reason for a contract killing. He left no doubt in his opening statement that it was the theory of the state's case that Dennis Wise has been hired by Gilbert Wiley to kill A. B. Addison and James Reid because of the episode with Derochea Leak in January, 1979.

The first witness called by the prosecution was Derochea Leak who testified substantially the same as she had at the trial before Judge Greenfeld. Specifically, she testified that in January, 1979, she lived at 4913 Goodnow Road in Baltimore City. At about 4:00 A.M. she was taking trash out when she was forced back into her apartment by

three (3) persons who had with them a gun. Two of the persons were wearing ski masks but the third who had the gun was not wearing a mask. These persons demanded of her drugs and money which she turned over to them (heroin and cocaine). Thereafter she was raped by all three. The witness further testified that during the attack one of the persons said, "Let's do what Jamie told us to do." (T.51)

After the attack the witness claimed she went with her friend to an address on Claybury Road where she was joined by Gilbert Wiley. There, Derochea Leak told Gilbert Wiley what had happened and described the person who was not wearing a mask to him. Some time later, Derochea Leak indicated that she spoke by telephone to Harry Lockwood who was a friend of Gilbert Wiley in New York. Mr. Lockwood had asked her to describe the person who had attacked her and she did so. Later, on a Friday, Mr. Lockwood called her residence and spoke to Gilbert Wiley.

Derochea Leak further indicated that in March, 1979, she was arrested for possession with intent to distribute narcotics at the North Avenue Motel. She insisted that the narcotics that were taken from the North Avenue Motel belonged to Gilbert Wiley. On cross examination the witness admitted that she was on probation at the time she was arrested in March, 1979, for possession of narcotics paraphernalia.

On re-direct examination Derochea Leak was questioned and responded as follows:

"Q. And you testified that he [Lockwood] called one other time, and he called after everything was over with?

A. Correct.

Q. What was everything that was over with?

A. The thing that he had set up in New York.

Q. What did he set up in New York?

Mr. Cardin: Objection.

The Court: Sustained unless she knows personally.

Q. Do you know personally what he set up in New York?

A. Only by phone call.

Q. From whom?

A. From Lockwood." (T. 97-98)

Lastly it should be noted that the only testimony given by Derochea Leak that specifically related to Dennis Wise was that when she lived at 701 Lennox Street, Mr. Wise lived there for a short period of time. (T.57-59)

Harry Lockwood testified that he was a resident of New York City for the past 27 years. The initial questions asked of him dealt with his friendship with Gilbert Wiley, with whom he indicated he had been acquainted for approximately 4 or 5 years. Mr. Lockwood testified that he had seen Gilbert Wiley in Baltimore and in New York and further that he also knew Derochea Leak who was the girlfriend of Gilbert Wiley. In February, 1979, Harry

Lockwood had a conversation with Derochea Leak during which she gave him certain information. Lockwood indicated that he had several conversations with Wiley, one of which too place in New York when Wiley had come to purchase mixing agents to cut heroin. After seeing Wiley in New York, Lockwood had called Wiley in Baltimore.

Over objection the court permitted Harry Lockwood to testify what he told Gilbert Wiley during the conversations. Mr. Lockwood was permitted to testify that he told Gilbert Wiley that "he [B. A. Addison] was in New York." (T.198) Lockwood indicated that he had known James Reid (whom he had met in New York on two occasions) and B. A. Addison whom "he had been knowing for quite awhile." The following day according to Mr. Lockwood, the defendant Dennis Wise knocked on his door and said, "Gilbert sent me." (T.200) Mr. Wise is also alleged to have asked Mr. Lockwood to

show him who B. A. was. In response to this request, Mr. Lockwood left the house, found B. A. Addison; returned to get Wise; and then pointed out B. A. Addison to the defendant Wise. According to Lockwood, Dennis Wise then began speaking to B. A. Addison at which time they went to an address known as 149 Manhattan Avenue. About 15 minutes later Wise returned to the home of Lockwood and said, "He's dead. I'm going to get $2,000.00 and I'm going to send you some of it." (T.205) The defendant elected not to ask any questions on cross examination indicating to the court that he renewed his Motion to strike the testimony not only because of double jeopardy and collateral estoppel but also because the evidence failed to disclose any type of common scheme. (See pages 205-212.)

When the case was submitted to the jury, a verdict of guilty resulted. This conviction was affirmed by the Court of Special Appeals

of Maryland; a Petition for a Writ of Certiorari to the Court of Appeals of Maryland having been denied.

QUESTION PRESENTED

Does the use by the prosecution of evidence of a conspiracy and agreement to murder for hire to prove elements of the crime of murder in the first degree after the Appellant had been acquitted of the conspiracy violate the double jeopardy clause of the Constitution of the United States through the doctrine of collateral estoppel.

REASON FOR ALLOWANCE OF THE WRIT

The doctrine of collateral estoppel has had a long and varied history. Through the years, the doctrine of double jeopardy has been amplified and the doctrine of collateral estoppel has been born and enlarged.

In the instant case, the Court of Special Appeals of Maryland has suggested that col-

lateral estoppel can only apply in those cases where the verdict of the first jury is not subject to interpretation. Specifically, the Maryland Court of Appeals distinguishes between evidence of acts committed and ultimate facts. The Court distinguishes that evidence of acts for which the accused has been acquitted can be re-litigated in a subsequent trial so long as the act does not constitute an ultimate fact. This distinction is untenable and completely contrary to cases decided by this Honorable Court and numerous state and federal circuit courts.

The Court of Special Appeals of Maryland found the evidence of a common scheme or plan admissible and as such was "very close to being the ultimate fact decided in the conspiracy cases." Judge Lowe, speaking for the Court of Special Appeals, indicates that this is a case of collateral estoppel, but since the fact determined by the jury in the

first case was only a matter of evidence and not a matter of ultimate fact, collateral estoppel did not preclude use of the evidence in the second trial. This erroneous distinction is further highlighted by the comment of the Court in its footnote on page 28 referring to the fact that since Maryland juries are judges of both law and fact a suggestion exists that collateral estoppel may never apply because it could have been a legal question decided by the jury rather than a factual one.[1]

This Court in the case of United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68 (1916), held that the common law doctrine of res judicata applied in federal proceedings; and that once a person had been acquitted, the

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[1]The concept that juries are the judges of the law as well as the facts was unique to Maryland. However, by the decision of Stevenson v. State, 289 Md. 167 (1980), the Maryland Court of Appeals has determined that such a concept was unconstitutional and is no longer the law of the State of Maryland.

Federal Government could not again prosecute a second time for the same offense. Since the decision in Oppenheimer, this Court has had the opportunity of reviewing the cases of Sealfon v. United States, 332 U.S. 575 68 S.Ct. 237 (1948), Dunn v. United States, 285 U.S. 390, 52 S.Ct. 189 (1932), Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 (1969) and Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970). The rationale of these cases and the lesson to be learned therefrom was that "once a person has been acquitted, a state cannot prosecute him a second time for a related offense having a common issue of ultimate fact essential to conviction, which the previous acquittal had determined in his favor."

In Sealfon v. United States, supra, the accused had been indicted separately for conspiracy to defraud the United States and for commission of the substantive act. In an initial jury trial, the accused was tried and

acquitted on the conspiracy charge. Subsequently, in a second trial he was tried and convicted of the substantive offense. This Court was called upon to determine the legal effect of inconsistent verdicts which occur when a jury in an initial trial acquits an accused of an offense and another jury in a second trial convicts him of a related offense having a common issue of ultimate fact essential to conviction which the acquittal had determined in his favor. This Court first distinguished Dunn v. United States, supra, since in that case the inconsistent verdicts had occurred in a single trial where the same jury acquitted an accused on one count of a multi-count indictment and convicted him on a related count of the same indictment involving a common issue of ultimate fact. This Court held in Dunn that such inconsistent verdicts could stand but ruled in Sealfon that inconsistent verdicts when reached in successive

trials could not stand. As Judge Davidson in Powers v. State, 285 Md. 269, noted:

> "It [Supreme Court] recognized that the first jury's verdict of acquittal determined that ultimate fact in favor of the accused while the second jury's verdict of conviction subsequently determined the same ultimate fact against the accused. It concluded that because the first jury's verdict of acquittal was a determination favorable to the accused of the facts essential to the conviction, the second jury's subsequent inconsistent verdict of conviction must fall."

What was binding on the Federal Government under Sealfon v. United States, supra, became binding on the states as a result of Benton v. Maryland, supra, and Ashe v. Swenson, supra. These cases held that the Fifth Amendment guarantees against double jeopardy and its extension known as collateral estoppel were enforceable against the states through the Fourteenth Amendment.

In Ashe v. Swenson, supra, three or four armed men broke into a basement in which six persons were playing poker and robbed each of

them. Ashe was originally tried for the robbery of one of the victims and a jury found him not guilty. Six weeks later Ashe was brought to trial for the robbery of another poker player and was convicted. Ultimately this Court reversed the conviction indicating:

> "Collateral estoppel means simply that when an issue of ultimate fact has been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future law suit." 397 U.S. 466, 90 S.Ct. at 1195

Thus it was concluded whether it be the Federal Government under Sealfon or the state government under Ashe, the prosecution was precluded from prosecuting an accused a second time for a related offense having a common issue of ultimate fact essential to conviction, when a previous acquittal had determined that issue in his favor.

Three cases decided by this Court have considered the doctrine of collateral estoppel and applied it to the facts presented even

though there was some question as to the verdict reached by the first trier of fact. (These cases are considered at length by the Maryland Court of Appeals in Powers v. State, supra.) The first case, Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2996 (1972), presented a situation where the accused had been indicted in several related indictments. The prosecution was unable to try all of the indictments in a joint trial because a pertinent statute dictated that a severance was mandated. The first trial resulted in an acquittal for the accused. Thereafter, the prosecution sought to proceed to trial with those cases which were necessarily severed from the first trial. This time the prosecution was successful and a conviction resulted. On Appeal, the conviction was reversed, this Court holding that the doctrine of collateral estoppel under Ashe v. Swenson, supra, applied. The Court reasoned that in spite of the fact that there had been a severance of the charges, collateral estoppel

was still applicable. This Court noted that:

> "after a jury had determined that Turner was not present at the scene of the robbery and the murder of Yates, the State could not prosecuted him for the robbery of Yates."

Thus Turner established that the doctrine of collateral estoppel applies even when a state is precluded by law from joining all of its charges in a multi-count indictment and proceeding against the accused in a simple trial.

A second case was that of Simpson v. State of Florida, 403 U.S. 384, 91 S.Ct. 1801 (1971). In this case, the accused had been convicted by a jury of armed robbery of the manager of a retail store. That conviction, however, was reversed by the Florida State Courts. On remand, Simpson was acquitted of the robbery of the manager of the store. The State of Florida then elected to charge and try the accused, Simpson, for the robbery of one of the customers in the store who was robbed at the same time as the manager. This time the

jury convicted him of armed robbery. In vacating and remanding that conviction, this Court reasoned that collateral estoppel applied not only where there was no reason to question the validity of the jury's findings of fact in favor of the accused, but also where the validity of those findings was questionable because a different jury at an earlier trial had resolved the same question of fact against the accused.

A third case to be considered is that of Harris v. Washington, 404 U.S. 55 95 S.Ct. 183 (1971). Here, Harris was charged with mailing a bomb which exploded in the house of Ralph Burdick, killing Burdick and Harris' infant son and injuring Harris' estranged wife. Harris was tried solely for the murder of Burdick. At trial, the state sought to introduce a typewritten letter allegedly written by Harris which threatened the lives of Burdick and Mrs. Harris. The trial court refused to

admit the letter into evidence based on the concept of marital communication. The jury returned a verdict of not guilty in favor of Harris. Thereafter, the state charged Harris with the murder of his son and assault on his wife. Now the letter which was inadmissible in the first trial was competent and admissible evidence to be offered by the prosecution. The letter was indeed admitted and Harris was convicted. This Court in reversing and vacating the conviction held:

> "Ashe v. Swenson squarely controls this case and collateral estoppel applies irrespective of whether the jury considered all relevant evidence and irrespective of the good faith of the state in bringing successive prosecutions." 404 U.S. at 56-7, 92 S.Ct. at 184.

Thus, this case establishes the fact that collateral estoppel applies not only where there is no reason to question the validity of the jury's findings of fact, but also where the validity of the jury's findings is questionable because it was not permitted to consider

all of the relevant evidence.

From these cases we learn that when an issue of ultimate fact has been resolved in an accused's favor, he has the right not to have that fact relitigated. Stated conversely, the prosecution cannot seek to offer evidence in contradiction of facts litigated at a previous hearing and resolved in favor of the accused even if at that first hearing the prosecution was precluded from joining all of the charges into a single trial (Turner v. Arkansas, supra); or where the validity of the jury's findings of fact in the first hearing are questionable (Simpson v. Florida, supra); or where the jury's findings in the first trial are indeed questionable because it was not permitted to consider all relevant evidence (Harris v. Washington, supra).

In Blackburn v. Cross, 510 F.2d 1014 (5th Cri. 1975), the Fifth Circuit interpreted Ashe v. Swenson to mean that "...there is no difference between relitigating an ultimate

fact or an evidentiary fact; relitigation of either is prohibited." Id., 510 F.2d at 1017. Blackburn was charged with assaulting Fletcher who identified the defendant as the person who had broken into her apartment and attempted to assault her. In addition, the State presented the testimony of two other women, Austin and McCune, both of whom lived in the same apartment complex as Fletcher and who also identified the defendant as their assailant. The defendant had previously been acquitted of the assault on McCune. At the trial for the assault on Fletcher, McCune's testimony was admitted over the defendant's objection as evidence of a similar offense tending to establish the identity of the defendant as Fletcher's assailant. The Fifth Circuit reversed the conviction of Blackburn finding that the admission of McCune's testimony was inadmissible in that the defendant had been acquitted in that trial. The factual situation

of Blackburn is closely analogous to that of the case at hand and the decision of the Fifth Circuit is in complete opposition to the Opinion announced by Judge Lowe. Whereas the Court of Special Appeals would distinguish between relitigating ultimate facts and evidentiary facts, the Fifth Circuit has specifically spoken to the point and stated that there is no distinction.

Specific attention should also be directed to the case of Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972). In this case, a defendant had been tried and acquitted for two prior robberies. In a later prosecution for another robbery, the State, for the purpose of showing common scheme or design, offered evidence that the defendant had committed the prior robberies. The State's theory was that the collateral estoppel doctrine under Ashe v. Swenson, supra, presented no bar because the issues which the State relitigated were not issues of ultimate

fact in the second prosecution. The Wingate Court discussed the rationale of Ashe v. Swenson at length and concluded:

> "We do not perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact or issue which depends upon whether the relitigated issue is one of 'ultimate' fact or merely as 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial."
>
> "The prosecution simply may not in the course of any subsequent trial of the same parties relitigate an issue which was determined as an issue of ultimate fact in an earlier prosecution." Wingate, 464 F.2d at 213-214.

In the case of State of Vermont v. Kerwin, 340 A.2d 45 (Vt. 1975), the defendant was charged in two cases with recklessly engaging in conduct placing others in danger of death

or serious bodily harm. Both charges arose from the same set of circumstances, but the alleged conduct in each differed. In the first trial the defendant was acquitted and in the second trial, over objection, references were made to the conduct charged in the first trial. The Supreme Court of Vermont reversed the conviction finding that admission of testimony regarding conduct for which the defendant had been acquitted was improper and as such the "rulings were in error, for the defendant had been acquitted of the first charge, and evidence of it was not proper for the consideration of the jury trying him on the second charge." Id., 340 A.2d at 48.

In United States v. Klosterman, 248 F.2d 191 (3rd Cir., 1957), a taxpayer, his associate, and a special Internal Revenue Agent were indicted for bribery and conspiracy to bribe and to defraud the United States. An acquittal was rendered on the conspiracy charge. In a

subsequent trial, the prosecution sought to introduce statements of co-conspirators allegedly made during the conspiracy as an exception to the hearsay rule. In other words, the prosecution in Klosterman sought to introduce hearsay statements as an exception to the hearsay rule even though Klosterman had been acquitted of the conspiracy at the former trial. The United States Court of Appeals for the Third Circuit held that an acquittal on the conspiracy charge rendered such evidence inadmissible. The Court reasoned that the acquittal on the conspiracy charge rendered evidence of a co-conspirator's statement made during the continuation of the alleged conspiracy inadmissible because the exception to the hearsay rule no longer existed. In other words, the acquittal of the conspiracy charge ended the availability of the "co-conspirator exception" for the prosecution.

The case of United States v. Keller,

decided May 23, 1980, by the United States Court of Appeals for the Third Circuit and reported in 27 Criminal Law Reporter 2294 adds an additional dimension to the concept of collateral estoppel. In Keller, the Third Circuit discussed the "doctrinal" rather than the constitutional sense of collateral estoppel. The court recognized that collateral estoppel has constitutional underpinings only in cases of multiple or fragmented prosecution and that the constitutional rationale for the doctrine is to prevent harassment of the defendant. Citing Wingate v. Wainwright, supra, and United States v. Mespoulede, 597 F.2d 329, the court ruled that the constituion demands the exclusion of evidence of crimes of which the defendant has been acquitted.

The facts of Keller indicated that Keller had been acquitted of purchasing drugs from a government informer. In this trial Keller and four others had been charged with con-

spiracy to distribute PCP. Keller admitted the participation but claimed that the idea of getting into the drug business was someone else's and that he did so only because of serious medical and financial problems of this other person. The government sought to undermine his defense by introducing evidence and cross examining Keller about his involvement in deliveries of methamphetamines for which he had been acquitted in the prior trial. On appeal Keller claimed that the evidence of the deliveries of methamphetamines was inadmissible because of the doctrine of collateral estoppel bars the evidentiary use of crimes for which he had been acquitted.

The court held:

> "In this court, the doctrine of collateral estoppel as applied in criminal cases has been used to bar not only reprosecution which we use here as encompassing multiple or fragmented prosecutions, but also evidence of crimes for which the defendant has been acquitted in prior prosecutions." See U.S. v. Simon, 225 F.2d 260, U.S. v. DeAngelo, 138 F.2d 466.

The court noted that the government argued that this case was different because Keller did not deny the fact that his participation in drug distributions but claimed a defense of entrapment. To this the court responded:

> "We agree with the Fifth Circuit that it is fundamentally unfair and totally incongrous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded that he did not commit. Wingate v. Wainwright, 464 F.2d at 215. The Government's position places an unjust burden on a defendant to require him to relitigate the very issue a jury decided in his favor. U.S. v. Mespoulede, 497 F.2d at 344."

The sum and substance of these opinions are that the prosecution cannot use any evidence of crime of which the defendant was acquitted.

Before proceeding with the specifics of this case, it is helpful to consider the Opinion of Judge Friendly in U.S. v. Kramer, 289 F.2d 909. Here the federal court states that if any fact decided at the first trial

is relied on by the prosecution in the second trial, collateral estoppel applies. Judge Friendly goes so far as to state that it is not critical whether it is an essential or ultimate fact - only that the state relies on it for any purpose. Following that rationale, it is incumbent to determine whether any facts decided against the prosecution at the first trial are relied upon by the prosecution at the second trial.

The cases heretofore discussed provide to reviewing courts several factors to be considered in determining if issues are regenerated in the second trial. These factors are 1) to review all the evidence from a distance to get the import of the evidence, 2) the announced purpose of the evidence, 3) an indepth review of individual testimony, 4) the instruction by the court, and 5) argument of the prosecution and its reliance on the evidence. As previously indicated, the prosecution sought during the first trial to

prove that Gilbert Wiley in seeking revenge against persons who had raped his girlfriend and stolen his drugs and money had hired Dennis Wise to kill James Reid and B. A. Addison. In a joint trial both defendants were acquitted after the jury was fully advised as to the meaning of conspiracy and the nature of the agreement required. By its verdict, it therefore found that there was no agreement between Wiley and Wise to kill either B. A. Addison or James Reid. In the second trial the entire state's case from opening statement to closing argument of the state's attorney was based upon the idea of a contract murder wherein Wiley hired Wise to kill Reid. The evidence showed a motive of Wiley to hire Wise in seeking revenge against Addison and Reid. In opening statement and closing argument, the prosecution stated over and over again, "It is the state's contention that Wise committed this murder for a contract.

Mr. Wise was there for no other purpose than to fulfill an obligation to Mr. Wiley to take care of Mr. Reid." The evidence produced between opening statement and closing argument hammered home over and over again the fact of an agreement and conspiracy between Wise and Wiley; the same issue which had been resolved in his favor by the verdict of not guilty in the first trial.

There is no question but that Dennis Wise was acquitted of the conspiracy to murder James Reid in a first trial. There is also no question that the state sought to use the alleged agreement between Wiley and Wise to establish the premeditation and deliberation of premeditated murder. The Maryland Court of Special Appeals suggests that this type of evidence is not one of ultimate fact, but only evidentiary fact and as such, a distinction can be made. Such a distinction is unreasonable and cries out against the weight

of authority and the position taken by this Court, the Federal Circuits, and many of the state courts. Accordingly, it is in the interest of the public that this issue be considered by this Honorable Court and that the doctrine of double jeopardy as explained by the doctrine of collateral estoppel be clarified, explained, and applied uniformly.

Respectfully submitted,

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APPENDIX

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 674

September Term, 1980

DENNIS WISE

v.

STATE OF MARYLAND

Opinion by J. Lowe

Filed: February 6, 1981

Dennis Wise has appealed his conviction of the first degree murder of James Reid after having been tried by a jury in the Criminal Court of Baltimore. Wise had previously been indicted for having conspired to murder, and for having murdered, James Reid in Baltimore City. He had also been charged with having conspired (in Baltimore City) to murder B. A. Addison in New York City. Whether appellant consummated that act in New York has yet to be determined although appellant agreed to waive extradition at the conclusion of his Maryland problems.

The State's theory was that Mr. Wise's conspiracies were in the nature of contracts to kill and that in these two instances he fully performed. It believed that Mr. Wise had been hired by one Gilbert Wiley to kill the victims because they had raped and robbed Derochea Leak, a girlfriend of Wiley who was a major narcotics dealer and who kept much of his profit in the apartment he rented for her.

At least one of the victims, along with two unidentified persons, went to the apartment to steal both drugs and profits and inferentially also intending to assault Ms. Leak, which they did.

Wiley and Leak then contacted an acquaintance, Harry Lockwood, presumably to have Lockwood find the perpetrators of the crimes. As to Addison he succeeded, notifying Wiley that Addison was in New York. The next day appellant arrived in New York, told Lockwood that "Gil sent me" and shot Addison after Lockwood had pointed him out.

It did not appear, however, that Wiley had used Lockwood as a middleman in disposing of Reid. Reid was killed not for his actual participation in the theft and assault, but rather because he was suspected by Wiley of having planned it. Apparently, the deaths of both were arranged at about the same time and for the same underlying reasons.

The two conspiracy cases were tried and concluded in September of 1979. The Reid murder case was also commenced at that time. The trials of Wise were joined with those of Wiley, obviously because they were allegedly the contracting partners in both instances and thus, the primary conspirators. Ms. Leak, who was to testify for the State, became the vortex of a plethora of procedural and evidentiary problems even before the trial actually commenced, and so remained throughout since her testimony regarding the conspiracies was essential--but admissible only if she were a conspirator.

When the cases were called, among the pending defense motions were those to sever the Reid and Addison conspiracy charges. Yet when appellant raised the severance issue prior to jury selection, he could not decide whether to fish or cut bait. He conceded that

> "...at this point we are not entitled to a severance because we have no

> grounds that we can give the court to indicate, as such, a severance."

Because of a conversation with Ms. Leak, however, he expressed the conviction that the State's evidence would show that rather than there having been two conspiracies to kill two people and that, somehow, this would entitle him to a severance at the end of the State's case for which he contended he could not be retried upon the second case for double jeopardy reasons. He suggested that the court defer its ruling until the end of the State's case, as was done in Ellerba v. State, 41 Md. App. 712, 728, cert. denied, 285 Md. 729, 734 (1979). Hesitantly, although seemingly acquiescently, the trial judge formally denied the severance on the information he had at that time, but suggested that counsel was free to renew the motion at the end of the State's case if it felt it proper to do so in light of the evidence elicited.

At the end of the State's case it was Ms. Leak's testimony that again brought on procedural and evidentiary difficulties. The first of a series of defense motions was to "suppress"[1] Ms. Leak's testimony as hearsay evidence of the conspiracies, without which the State conceded it had no case. The State stood upon the premise that her testimony was admissible because she was a part of the conspiracy, i.e., a "co-conspirator." After substantial agonizing, the court held that there was sufficient evidence to indicate that she had conspired in the death of Addison, but, while privy to the plan to kill Reid, there was no evidence that she had participated in his negotiated departure. Her testimony, as it related to the Reid conspiracy, was therefore "suppressed."

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[1]This motion, though referred to by counsel as a motion to suppress, was obviously intended by counsel, and accepted by the court, as a motion to strike the testimony.

There followed defense motions for judgment of acquittal in all cases, but only one was granted, i.e., as to the Reid conspiracy -- there having been insufficient evidence without Ms. Leak's testimony. Appellant then moved for mistrial of both the Addison conspiracy and the Reid murder. The court denied these motions. Immediately appellant moved to sever the two charges remaining against appellant, that is, conspiracy to murder Addison and the murder of James Reid. Because they were separate and distinct crimes, the court granted the motion.

Acknowledging that he may have been somewhat premature because the State had not been called upon to elect where it "was going with the case," appellant then revived his motion for mistrial:

> "...the specific reason for the renewal of the motion for mistrial is that if the State proceeds on the Addison conspiracy, then the evidence the jury heard this morning, I would submit is completely inadmissible,

> that is, statement about the murder of Reid and the res gestae statement of Dale Streams which came in through Officer Mallinoux, I believe would be absolutely inadmissible. If on the contrary the State elects to proceed with the murder of Mr. Reid, then I believe that the testimony of Mr. Lockwood would be completely indadmissible in that case, and as such I believe that no matter which case the State would elect to pursue at this time that there has been evidence produced, a significant amount of evidence, prejudicial evidence that no curative instruction could remove this prejudice from the jury, and in such the Court should grant the mistrial."

The court again denied the motion but called upon the prosecutor to "elect which of the two charges against Mr. Wise he want[ed] to proceed with." Because it was more reasonable to keep both alleged conspirators in the same trial (i.e., Wiley and Wise), the State chose to proceed with the conspiracy to kill Addison. While it would seem that the evidence of the Reid murder previously produced by the State might have prejudiced the jury against appellant in the Addison conspir-

acy, it obviously did not because on September 27, 1979, the jury found appellant not guilty of so conspiring.

On October 15, 1979, appellant moved to dismiss the Reid murder charge on grounds of double jeopardy, among others. The motion was heard and denied on January 23, 1980, and the case was set for trial and tried on March 11, 1980, 30 days having been provided appellant in which to appeal the double jeopardy denial.

From the time of his arrest on March 6, 1979, appellant repeatedly sought a speedy trial individually and through diligent efforts of his attorney. He asserts a denial of that constitutional right as an issue on appeal here, just as he contends that his conviction was improper as he was twice exposed to jeopardy. Neither of those direct assertions of constitutional violation gives us but slight pause under the facts of this case.

- collateral estoppel -

The primary issue raised by appellant is an amalgam of evidentiary and constitutional issues, and as indicated below, it again focuses on Derochea Leak. Her testimony was crucial not only to prove that Wise killed Reid, but also that he did so premeditatedly. She was to testify primarily about conversations with Gilbert Wiley regarding his having hired Wise to kill Reid, then circumstantially support that hearsay with her own observations, as would the State with other evidence. But such conversations were inadmissible hearsay unless they could come in through some exception to the hearsay rule.

The State proffered two exceptions to avoid the hearsay stymie. It contended that Ms. Leak was a co-conspirator together with Wiley and Wise; however, the Reid conspiracy acquittal was expressly predicated upon a finding by the trial judge as a matter of law that she was <u>not</u> a conspiratorial partici-

pant in the Reid case. Furthermore, since a jury had acquitted Wise of conspiracy to kill Addison in New York, the "ultimate fact" that there was no conspiracy could not be relitigated. Powers v. State, 285 Md. 269, cert. denied, 444 U.S. 937. This is precisely what the trial judge hearing the murder case ruled preliminarily, and the record indicates he carried out his resolve. No hearsay evidence was offered, or if offered, it was not admitted.

Appellant does not assert any violation of the hearsay rule; however, he sought before and during the murder trial to preclude any evidence which had been introduced in the previous conspiracy trials.

> "But the Court left one little phrase out that bothers me. That is why I am asking the Court now for a more explicit ruling. The Court indicated the State cannot bring in hearsay. I understand that.
>
> My suggestion or my argument is the State cannot bring in any evidence of the conspiracy either, that that has already been litigated between the parties and therefore cannot be brought in.

> Now, the question or the point I am coming to is the robbery, for example, of Derochea Leak. That is all part of a conspiracy. Whether she was robbed or not has nothing to do with whether Mr. Wise killed Jamey Reid other than to show the beginning of a conspiracy between Wise and Wiley. That is Dorochea Leak is attacked, Wiley then hires Wise.
>
> They have been acquitted of that. Therefore in my opinion and what I am arguing to the Court, there can't be any reference to that. That issue has been litigated. There can be no reference to exception, but any reference to it whatsoever."

He now embellishes his objections upon appeal by contending that the doctrine of collateral estoppel -- "kissin' cuzzin" to res judicata -- precluded any evidence which had been considered by the acquitting jury. This argument is predicated upon the gist of Ashe v. Swenson, 397 U.S. 436, 443 (1970), which is that:

> "'Collateral estoppel'...means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

The decision in Ashe v. Swenson, which incorporated collateral estoppel into the constitutional protection against double jeopardy, raises the question of whether double jeopardy precludes the evidentiary use of crimes for which there has been a prior acquittal, or whether the doctrine applies only in situations of reprosecution. Although one might read "intimations" into Ashe v. Swenson that the constitutional incorporation of collateral estoppel goes beyond reprosecution, the fact situation presented in that case related solely to reprosecution and did not stretch the constitution further into the field of evidence.

At least two federal circuit courts of appeal appear to have held that the Constitution demands the exclusion of evidence of crimes of which the defendant has been acquitted: Wingate v. Wainwright, 464 F. 2d 209 (5th Cir. 1972), and United States v. Mespoulede, 597 F. 2d 329

(2nd Cir. 1979). But both of these cases stress the relitigation of an issue decided theretofore in an accused's favor. Wingate could perceive no distinction in quality between relitigating an "ultimate" fact and an "evidentiary" fact which had been once decided in an accused's favor. Id. at 213-14. Significantly, its reasoning followed expressly Judge Friendly's language in United States v. Kramer, 289 F. 2d 909 (2d Cir. 1969), which stated that:

> "'The Government is free within the limits of the Fifth Amendment,...to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it in the first trial, no matter how unreasonable the Government may consider that determination to be.'" Wingate, supra at 214, quoting from Kramer, supra at 916. (Emphasis added).

Although some jurisdictions have held that the theory underlying res judicata is confined to ultimate facts and does not extend to

evidentiary ones, e.g., State v. Thompson, 241 Iowa 16, 39 N.W. 2d 637 (1947), Maryland has never decided specifically whether collateral estoppel goes beyond multiple or fragmented prosecutions. See generally Annot., 9 ALR 3d 203, 228 et seq. (1966). A recent and exhaustive case from the Court of Appeals (Powers v. State, supra), while not deciding the question, clearly indicates that it will interpret Ashe v. Swenson, supra, as not distinguishing between ultimate facts and evidentiary facts for purposes of relitigation. We hasten to caution, however, that the same case also clearly indicates that it will apply the limitations that were explicit in Judge Friendly's admonitions.

In Powers v. State, supra, Judge Davidson carefully analyzed all of the relevant Supreme Court cases relied upon by appellant (among others) interpreted in the light of a multitude of jurisdictional analyses. While Powers

did not turn upon whether collateral estoppel precluded relitigation of evidentiary facts, its statement of purposes of that doctrine seems quite clearly to indicate that it will apply to evidentiary facts but also, more importantly, that ti will apply only to those "necessarily determined."

> "One of the purposes of the doctrine of collateral estoppel is to prevent prosecutors from purposefully using their powers to provide plural opportunities to convict an accused. Ashe v. Swenson, 397 U.S. at 445 n. 10, 90 S.Ct. at 1195 n. 10. Another is to encourage care in the preparation and presentation of the prosecutor's initial case in order to prevent relitigation which overburdens already crowded dockets and wastes public funds. Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 32 (1960). The primary purpose of the doctrine of collateral estoppel, however, is to avoid compelling an accused to prove his innocence to two or more juries. More precisely, the doctrine's purpose is to avoid compelling relitigation of a fact material to the question of innocence when it appears substantially certain that a jury has already decided that fact in the accused's favor." Id. at 287 (Emphasis added).

That same limitation appears in every case cited by appellant and notably in those upon which he especially relies, Turner v. Arkansas, 407 U.S. 366 (1972); Simpson v. Florida, 403 U.S. 384 (1971), and Sealfon v. United States, 332 U.S. 575 (1948) (his mainstay), as well as Wingate and Kramer, both supra.

A recent case in the Third Circuit found it unnecessary to address whether collateral estoppel constitutionally barred the evidentiary use of conduct of an accused for which he had been acquitted because that circuit had so applied the doctrine long before Ashe v. Swenson (1970), in United States v. Simon, 225 F. 2d 260 (3d Cir. 1955), and even before Sealfon (1948), in United States v. DeAngelo, 138 F. 2d 466 (3d Cir. 1943). It held that however Ashe v. Swenson was interpreted, it surely did not proscribe extending the doctrine as that circuit had previously extended it.

That case, United States v. Keller, [1980], 27 Crim. L. Rep. (BNA) 2294 (3d Cir. May 23, 1980), is significant in that it seems to carry the doctrinal application to evidence, even beyond the Friendly limitations of facts "necessarily determined," which we indicated appeared implicit in Powers and all of the cases therein discussed.

In Keller the accused and others were charged with conspiracy to distribute PCP. Keller admitted his participation but testified that he had been entrapped because he was cajoled and persuaded to do so by, for and at the behest of a government informer. The government sought to undercut that testimony by cross-examining the defendant about his involvement in drug deliveries at different times, for which transactions he had been acquitted as a result of an entrapment defense. The court allowed no evidence of the accused's conduct which had been the subject of the

prior acquittal. Significantly, the court noted:

> "The government argue[d] ... that this case is distinguishable from the situations previously before this court because Keller did not deny the fact of his participation in the drug distributions but claimed that he was excused from criminal prosecution because he was entrapped. The Government contends that collateral estoppel is inapplicable because '[i]t is not the result of the prior case that was material, but rather the facts which were undisputed,' Thus, the Government would have us hold that the prior conduct is admissible notwithstanding the determination by the earlier fact finder that the defendant's state of knowledge and level of participation did not satisfy the requirement of the criminal law.***We decline to so hold since that would eviscerate the effect of the prior acquittal. We agree with the Fifth Circuit that '[i]t is fundamentally unfair and totally incongrous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit.' Wingate v. Wainwright, 464 F. 2d at 215. The Government position 'places an unjust burden on a defendant to require him to relitigate the very issue a jury decided in his favor.' U.S. v. Mespoulede, 597 F. 2d at 334." Keller, supra at 2295-96.

That is but a tiny step from holding that no evidence introduced in a case resulting in an acquittal may ever be used in a subsequent prosecution for any prupose -- but even there it does fall short of that extreme. We cannot believe that any jurisdiction would close that last gap, especially in conspiracy cases and their underlying crimes. We are certainly satisfied that Maryland would not. If such broad interpretation were placed upon the doctrine of collateral estoppel, it could not stand together with the well-established principle that an acquittal of a conspiracy to commit a crime does not bar a subsequent prosecution of the crime. See Annot., 92 L. Ed. 185, 188 (1949). See, also, Sealfon v. United States, supra at 578-79.

A conspiracy is a corrupt combination to accomplish a criminal or unlawful purpose by any means, or to accomplish any purpose by criminal or unlawful means. L. Hochheimer,

Criminal Law §285 (2d Ed. 1904). Although the gist of the crime is the combination, it is necessary in either case to submit evidence of the purpose or means of the commission of or attempt at the underlying crime. If we accept the theory of appellant, any evidence in a conspiracy case, whether relating to the combination or to the ultimate criminal object of an accused, would be forever barred from use at a subsequent prosecution for commission of the underlying crime, which case may have been severed at his own insistence. Whatever may be the law in the third circuit or elsewhere, that is not the law of Maryland.

In Scarlett v. State, 201 Md. 310, cert. denied, 345 U.S. 955 (1953), the defendant who had previously been acquitted of having violated the lottery laws was subsequently convicted on the same evidence of having conspired to violate them. On appeal, Scarlett contended that evidence used in the case for which he

had been acquitted should not have been admitted in the subsequent conspiracy case. Relying on the language (not the result) of Sealfon, supra, the court said:

> "We cannot agree with appellant that his acquittal of the charges of violating the lottery laws on the three specified days barred the use of evidence obtained on those days to substantiate the charge of conspiracy." Id. at 319.

Six months later, in that same term of court, Judge Hammond addressed more explicitly the fact that res judicata (the "kissin' cuzzin" of collateral estoppel) does not prevent evidence of acts constituting a crime for which an accused was convicted from use in a subsequent trial for another and separate crime. Rouse v. State, 202 Md. 481, cert. denied, 346 U.S. 898 (1953), differed somewhat from Scarlett and from the case at bar. Rouse had been convicted at his first trial of having violated the lottery laws. Thereafter he was convicted in a second trial of having conspired

to violate those laws. The Court of Appeals affirmed although the State used much of the same evidence to convict in each case. Significantly in Rouse and in the case before us, appellants placed primary reliance upon Sealfon, supra.

The accused in Sealfon was indicted for conspiracy to defraud the United States and separately for the substantive offense. He was acquitted of conspiracy but convicted in a separate trial for the substantive offense. As explained by Judge Davidson in Powers, supra at 277, the Supreme Court in Sealfon:

> "recognized that the first jury's verdict of acquittal determined an ultimate fact in favor of the accused while the second jury's verdict of conviction subsequently determined the same ultimate fact against the accused. It concluded that because the first jury's verdict of acquittal was a 'determination favorable to [the accused] of the facts essential to the conviction,' the second jury's subsequent inconsistent verdict of conviction must fall."

In summarizing the teaching of that case, how-

ever, Judge Davidson pointed out that Sealfon:

> "established not only that inconsistent verdicts, when reached in successive trials, are not permissible, but also that once a person has been acquitted, the federal government cannot prosecute him a second time for a related offense having a common issue of ultimate fact essential to conviction, which the previous acquittal had determined in his favor." Powers, supra at 277. (Emphasis added).

In analyzing Sealfon both Judge Hammond in Rouse and Judge Davidson in Powers, although writing for different purposes, focused upon and noted that in Sealfon the evidentiary proscription did not extend to all that evidence used in the first case to make up the violation of the crime alleged. It was only the "one fact essential to a finding of guilty" which could not be used in the subsequent prosecution of a different crime. Rouse, supra at 490.

By blending the key clauses of these dissertations, we condense them to a workable rule that fully supports the anti-harassment

function of collateral estoppel. When it appears substantially certain that a jury has already decided a fact essential to conviction in the accused's favor, (Powers, supra, at 287) "that particular fact" (Rouse, supra at 490) which was "necessarily determined" (Kramer, supra at 916) may not be relitigated at a subsequent trial for a separate crime.

In the case at bar, the trial judge was absolutely correct in ruling that Ms. Leak's hearsay testimony of Wiley's conversation relating to appellant was not admissible under the co-conspirator's exception to the hearsay rule. Obviously in light of that determination, she could not qualify as a conspirator. But there was no reason to exclude her testimony of the rape and robbery which would circumstantially show why the victim (Reid) had been killed. A closer question arises, however, in regard to the testimony of Harry Lockwood regarding the murder of the other victim

(Addison) in New York. The obvious purpose of this testimony was to show that Addison's murder was part of the same common scheme or plan which also resulted in Reid's murder, as indicated by appellant's comments to Lockwood following the murder of Addison.

By circumstantially connecting Addison's participation in Ms. Leak's rape and robbery with Reid's having planned it (at least in the mind of the employer, Wiley), the testimony that appellant was paid to kill Addison was admissible as a common plan or scheme exception to the bar of evidence relating to other crimes. Ross v. State, 276 Md. 664 (1976). The very fact that its admissibility rests upon the common plan or scheme exception, however, makes it appear very close to being the "ultimate fact" decided in the conspiracy cases. It is such suspect circumstance as this that requires one more step upon appellate review.

All of the cases cited by appellant,

especially his primary authority, Ashe v. Swenson, Turner v. Arkansas, and Powers v. State, as well as Simpson v. Florida, stand for another principle implicit in both Rouse and Scarlett. When doubt arises, the determination of whether collateral estoppel applies where the previous acquittal was based upon a general verdict requires the court to examine carefully the record of the prior proceedings, taking into account the evidence, the instructions, and any other relevant matter in the light of the crime acquitted and that convicted. From this review we must conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration in the case last tried.

Appellant argues most persuasively that from opening statement to closing statement and sprinkled throughout the testimony there are statements and allusions of and to a

"contract" killing. He notes that there is a very find semantic line between a "contract" to kill and an unlawful combination to kill. He urges that when he was found not guilty of having combined unlawfully to commit a crime, that determined nonparticipation in anything therein related, such as a murder for hire, and precluded the re-use of any evidence to show motive or premeditation and deliberation which might be inferable from the money-motive in this case.

We do not see the collateral estoppel cases as going this far. The purpose of the evidence in the conspiracy cases was to prove the ultimate fact of a combination. Whether that combination existed is not essential either to the motive of appellant in killing the victims or to whether he deliberated upon it in advance. Although the two factfinders were permitted to view and hear some of the same factual evidence, the "ultimate fact" which they were to decide was entirely different.

The first factfinder did not ever decide, or need to decide, whether appellant killed Reid; nor was there a need to decide that issue as to Addison. It follows that the first factfinder had no reason to concern itself with motive or with premeditation, which were the only related concerns of the second factfinder. The second factfinder, on the other hand, was not concerned with whether there was or was not a conspiracy. Although all conspiracies must presuppose elements of premeditation and deliberation, that which is significant here is that the converse is not true.

Our review of both cases, including the instructions of the courts, provides us with assurance that the ultimate facts decided were not the same "[T]he doctrine's purpose [of] avoid[ing] compelling relitigation of a fact material to the question of innocence: was not intruded upon because it did not appear "substantially certain that a jury ha[d] already

decided that fact in the accused's favor." Powers, supra at 287.[2]

- double jeopardy -

At the hearing on the motion to dismiss on double jeopardy grounds, appellant sought to avoid the effects of consenting to a mistrial by distinguishing between his motion for severance and a mistrial motion to which he contended he had never assented.

> "MR. CARDIN: The only response that I want to make, Your Honor, is since the docket entries do not indicate any type of mistrial by any party, if they are going -- if the Court is now going to state that it meant to declare a mistrial, whatever it may be, I just want the record to show we object ot the mistrial, if I hadn't done it then -- if it is

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[2]We should also note that in light of Maryland's constitutional provision making the jury the judge of law as well as of fact, Md. Const., Art. 15, §5, an acquittal by the jury at the first trial may have rested solely on its unique view of the law concerning that offense, and cannot be taken as having necessarily "determined" any particular question of fact. Benton v. Maryland, 395 U.S. 784, 804 (1969) (Harlan, J., dissenting).

> going to be construed that we consented to it by moving for severance, then the record will speak for itself, but I just want to make it clear that we never consented verbally, affirmatively, to a mistrial."

The fragrance is not affected by what we call the flower. The distinction does not turn upon the label applied by the trial judge. The critical question is whether the order contemplates an end of all prosecution of the defendant for the offense charged. Lee v. United States, 432 U.S. 23, 30 (1977). Appellant got what he asked for from start to finish. He not only moved for severance, and suggested that State thereafter elect its course (which was in every effect consent to a mistrial of one or both), but also twice actually sought a mistrial which is, practically speaking, that which he received -- a temporary respite rather than a final adjudication. See Lee v. United States, supra. As indicated in Bell v. State, 286 Md. 193, 201-05 (1979), and repeated in Anna Mae Jones v. State, ___Md. ___ (No. 7, September Term, 1980, filed October

14, 1980) sl. op. at 9:

> "Retrial is not barred as violative of the Double Jeopardy Clause of the Fifth Amendment when a mistrial is declared at the behest or with the consent of the defendant unless such error or misconduct, sufficient to justify the declaration of a mistrial, was committed by either the prosecutor or the court with the intention of (1) forcing the defendant to move for or consent to a mistrial, or (2) prejudicing his prospects for an acquittal if the trial continued to a verdict. It is 'bad faith conduct by judge or prosecutor' with such intent that prohibits retrials."

We have carefully reviewed the entire record and find not the slightest indication of "bad faith conduct by judge or prosecutor." From the very beginning -- even before the trial commenced -- appellant elected the course which the court was compelled to pursue. While we did not and do not recommend deferring severance decisions, it was his suggestion that the court do so. He may not now fashion the Ellerba shield into a double jeopardy sword since it was he who carefully chose both armor and grounds upon which to do battle.

The confusion which resulted, however, should indicate the wisdom of avoiding that procedure after jeopardy has attached -- in more ways than one.

- speedy trial -

The same rationale applies to his complaint of denial of a speedy trial. Unquestionably he most carefully guarded himself by asserting his right promptly, repeatedly and diligently through efforts of his attorney. So diligent was counsel that he first filed his motion on April 9, 1979, two weeks before he formally filed his appearance notice on April 26, 1979. Less than a month after his first motion, he filed a second (on May 2, 1979) and by September he was heard on those motions which were denied. In applying the balancing test of Barker v. Wingo, 407 U.S. 514, 530 (1972), those two assertions would tilt distinctly in favor of appellant, see Gillis v. State, 4 Md. App. 265, 267 (1979), and such motion was

filed yet again before his second and final trial on March 11, 1980, which clearly preserved the assertion factor in his favor. Testimony indicated that appellant's attorney did not stop with merely filing motions but sought trial dates from the assignment clerk on several occasions. These efforts were thwarted by the clerk's insistence that the prosecutor must agree upon a date.

However diligent were these repeated efforts, we note that the Supreme Court does not view the assertion factor strictly in a quantitative sense but relates it to the other facts as well.

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." Barker v. Wingo, supra at 531.

The State's reasons for the initial delay seems only to have been attributed to the

orderly administration of justice. See Epps v. State, 276 Md. 6, 110 (1975). One month of that seven-month time span was peculiarly the fault of appellant due to the unavailability of his counsel, June 19, 1979 to July 11, 1979. Although that which is an orderly administration obviously varies from time to time, surely six months is none too long to prepare and try a complicated dual conspiracy-to-murder and murder case spanning two states. The record further suggests that appellant was also involved with other criminal charges, and his counsel during that time, was equally involved in court appearances.

But then we add an additional six months, from September 26, 1979 when the murder trial was aborted, to March 11, 1980 when it was finally tried. Again appellant's counsel was unavailable between October 1, 1979 and November 9, 1979. Notwithstanding such unavailability, he filed his third motion to dis-

miss on speedy trial grounds on October 15, 1979.

But for the burden of cases in Baltimore City, it is hard to understand why this case could not have been set down sooner; however, our review of the record indicates that the State made every reasonable attempt to dispose of it while permitting appellant requisite opportunity to pursue the tactical course he had chosen.[3] Assuming as we must, based on his holding, that the trial judge believed this recitation, we cannot say he was clearly erroneous in doing so.

In regard to prejudice, we have presumed as much throughout as we are compelled to do irrebutably for purposes of determining constitutional dimension, Brady v. State, 288 Md. 61 (1980), and through our analysis under Barker v. Wingo, supra, in the absence of rebuttal by

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[3]So as not unnecessarily to burden this record, we have appended excerpts from the prosecutor's testimony in that regard.

the State. Brady v. State, 46 Md. App. 518 (on remand) (1980). We have weighed the prejudice we have presumed as enhanced by the continued pretrial incarceration of appel-land, but note that such is not dispositive of this case, Wilson v. State, 8 Md. App. 299, 307 (1969); nor is any other single factor dispositive, despite the obvious limitations it put upon appellant when all factors are placed upon the scale. Barker v. Wingo, supra, at 532.

Appellant testified that two witnesses died prior to his first trial, each of whom would have verified that the prosecution witness Lockwood was actually the contractor buying the victim's lives rather than Wiley. Appellant did not say, however, that the witness would have testified that appellant was not the contracting instrument of death -- or more importantly -- that appellant did not in fact kill the victim Reid.

On balance, then, we cannot find that appellant was denied a speedy trial under the facts of this case. The record reflects a concerned and diligent effort by the State to move forward to conclusion without running roughshod over appellant's rights to defend himself with preliminary procedures (e.g., his various motions to dismiss, etc.).

We are, of course, always concerned when a case is not tried within the period of "constitutional dimension." The problem is that that period varies depending upon the particular circumstances of each case. As a consequence, we must use the same analysis twice -- first to determine if the delay exceeded constitutional dimension so that we can then secondly determine if a speedy trial were denied. Frequently, if the time span chargeable to the State does not exceed that which was procedurally orderly under the circumstances of the case, the period will not

exceed that referred to as within "constitutional dimension." Since no yardstick has been provided by the Legislature or the Court of Appeals, other than the 180-day period for setting a trial date following the first appearance of defense counsel or defendant himself (Md. Rule 746 a; Md. Ann. Code art. 27, §591), we are compelled to use that time frame as a general guide for determining orderly procedure. The facts of this case do not reveal any unnecessary detriment to appellant nearly so grave as that which was caused by the five-and-one-half-year delay which occurred in Barker v. Wingo, supra.

JUDGMENT AFFIRMED

COSTS TO BE PAID BY APPELLANT